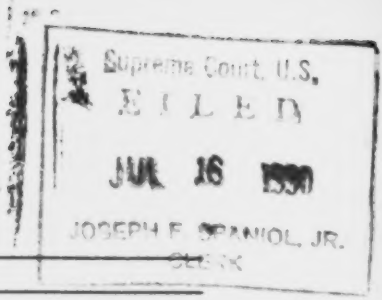
90-1116



CAUSE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO PARTS,

PETITIONER,

V.

MID-AMERICA INDUSTRIES, INC.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF ARKANSAS SUPREME COURT

EDWARD L. MUNSON
ATTORNEY FOR PETITIONER
221 S. COLLEGE
P.O. BOX 1006
TAHLEQUAH, OKLAHOMA 74465
(918)456-8781

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner denied his constitutional guaranties of equal protection and due process under the Fourteenth Amendment to the United States Constitution by being required to have his case tried in an Arkansas venue which was not proper for a case brought on open account and under an Arkansas statute which when previously applied to a corporation, was found to be unconstitutional?

2. Was the petitioner denied equal protection and due process under the Fourteenth Amendment of the United States Constitution by the refusal of the Arkansas Supreme Court to consider petitioner's constitutional argument regarding the venue statute and to consider the action as one on open account from the record submitted?

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IN THE
SUPREME COURT OF THE UNITED STATES

CAUSE NO. _____

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO PARTS,
PETITIONER,

V.

MID-AMERICA INDUSTRIES, INC.
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the case on the 12th day of March, 1990, and on which rehearing was denied by the Arkansas Supreme Court on the 16th day of April, 1990.

OPINION BELOW

The opinion of the Supreme Court of Arkansas was published and appears at

___S.W.2d.___. It is annexed as Appendix "A" to this petition. The Order Denying Rehearing to the knowledge of this petitioner is unreported. It is annexed as Appendix "B" to this petition. This opinion was the result of a review of a judgment of the Circuit Court of Sebastian County, Arkansas, which is attached hereto as Appendix "C".

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BY THE COURT BELOW

Petitioner, through his counsel, objected to venue of the Circuit Court of Sebastian County, Arkansas, in which respondent brought its action against petitioner from such action's initial stages. Petitioner maintained his objection throughout the proceedings in the trial court and on appeal to the Arkansas Supreme Court as such venue being

contrary to Arkansas law and in violation of constitutional guaranties of equal protection and due process. The matters were overruled in the trial court. Petitioner on appeal to the Arkansas Supreme Court also presented the issue that the Arkansas statute upon which the court had found venue was not proper, had been found to be unconstitutional as to corporations, and therefore had to be unconstitutional in regard to individuals such as the petitioner who were situated in a position similar to that of corporations. The Arkansas Supreme Court denied the petitioner any relief and affirmed the judgment of the trial court.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 12, 1990. A timely Petition for Rehearing was filed

and was denied on April 16, 1990. Jurisdiction of this court is invoked under 28 U.S.C.A., 1990 Revised Rules of the Supreme Court, Rule 13.4 and 28 U.S.C.A. §1257 (a).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves Arkansas Code Annotated §16-60-109 which provides in relevant part:

> "a. Contract actions against a nonresident of this state or a foreign corporation may be brought in any county in which the plaintiff resided at the time the cause of action arose."

The case also involves Arkansas Code Annotated §16-60-111 which provides in relevant part as follows:

> "a. An action on a debt, account, or note, or for goods or services may be brought in the county where the defendant resided at the time the cause of action arose."

And further involved in the action is Arkansas Code Annotated §16-60-114:

> "a. Contract actions by resident subcontractor, supplier, or materialman against a prime contractor or subcontractor who is a nonresident of this state or who is a foreign corporation may be brought in the county in which a plaintiff resided at the time the cause of action arose."

The constitutional provisions involved include the Fourteenth Amendment to the United States Constitution, in relevant part as follows:

> "... nor shall any state deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is an Oklahoma resident engaged as an individual in the auto parts retail business. Respondent at the time herein concerned was an auto parts distributor doing business in Oklahoma,

Arkansas., and other states with its principal place of business in Fort Smith, Arkansas. In 1985 petitioner was solicited in Oklahoma by respondent to join its line of auto parts stores. In early 1986, petitioner traveled to Arkansas to look as respondent's program and then respondent's employees traveled to Oklahoma and looked at petitioner's retail stores and the parties made an agreement at that time. Disputes arose between the parties over the terms of the agreement, particularly in the regard to payments or credits for merchandise and the agreement of the parties was termined by the respondent in December of 1987.

In March of 1988, petitioner filed a federal diversity action against respondent in the Eastern District of Oklahoma for breach of written and oral agreements, wrongful termination of

written and oral agreements, and tortious interference with business relations and defamation. Respondent answered generally denying petitioner's claims and counterclaiming for collection of open accounts claimed due.

In October of 1988, respondent filed a complaint against petitioner in the Circuit Court of Sebastian County, Arkansas, for collection of the same open accounts contained in its counterclaim in federal court. Petitioner presented motions to dismiss the respondent's action in the Arkansas and federal courts for improper venue and other matters which were overruled by the trial court. The case proceeded to jury trial in the Arkansas court, and a verdict was rendered against petitioner.

The petitioner filed a timely motion for new trial with the trial court which

was subsequently overruled. The petitioner then timely appealed to the Supreme Court of Arkansas which affirmed the trial court on March 12, 1990. Petitioner timely filed for rehearing in the Supreme Court of Arkansas which was denied on April 16, 1990. From such judgment and orders, the petitioner now appeals. At the time the action was brought in the Arkansas court by respondent, petitioner had no parts stores operating in Arkansas, but did own real estate and had had a parts store previously in Siloam Springs, Washington County, Arkansas, which had been closed subsequent to doing business with respondent. Petitioner's argument for change of venue was based upon the fact that he had no property, business, or debts in Sebastian County, Arkansas, and that the only place proper in Arkansas for

the action to be brought would have been Washington County, Arkansas.

ARGUMENT

1. THE TRIAL COURT'S OVERRULING OF PETITIONER'S MOTION TO DISMISS FOR IMPROPER VENUE WAS ERROR BECAUSE PETITIONER WAS A NONRESIDENT SUED ON AN OPEN ACCOUNT WHICH UNDER ARKANSAS VENUE STATUTES HAD TO BE BROUGHT WHERE HE OWNED PROPERTY OR HAD DEBTS OWING WITHIN THE STATE.

Petitioner at all times concerned was a resident of the State of Oklahoma. Respondent was a Delaware corporation with its principal place of business located in Fort Smith, Sebastian County, Arkansas. When a dispute arose between the parties over their agreement which involved the accounts of petitioner with respondent, each party brought a separate action.

Petitioner first filed an action against respondent in the United States District Court for the Eastern District of Oklahoma. Respondent subsequently filed an action for collection of the open accounts against petitioner in the Circuit Court of Sebastian County, Arkansas. At the time of bringing of such action by respondent, petitioner had no retail stores nor had he ever had any retail stores that did business with respondent in Sebastian County, Arkansas. Petitioner did own property and had done business through a retail store, both in Washington County, Arkansas. Petitioner filed a motion to dismiss the Sebastian County action of respondent for improper venue because the action brought as one on open account required that petitioner have property or debts due him in Sebastian County, Arkansas, for the action to be

proper there; petitioner did not, The trial court overruled the petitioner's motion to dismiss, and the matter proceeded to trial. Judgment was entered against petitioner in the trial court, and the matter, after rehearing to the trial court was denied, proceeded on appeal to the Supreme Court of Arkansas which affirmed the trial court decision. Petitioner now appeals the affirmation by the Supreme Court of Arkansas, after denial of timely rehearing in said court.

The suit brought by respondent was on open account as set forth in its original complaint in the record. See Appendix "D". Under Arkansas law, ACA §16-60-111, the respondent should have brought its action where the defendant resided at the time the cause of action arose.

"ACA §16-60-111. Actions on debt, account, or note.
a. An action on a debt, account, or

> note, or for goods or services may be brought in the county where the defendant resided at the time the cause of action arose."

At the time the cause of action arose, when the accounts were created, the defendant, petitioner herein, resided in Oklahoma. However, the respondent brought its action in the county in which it resided at the time the cause of action arose. Arkansas law had a provision which allowed contract actions against nonresidents to be where plaintiff resided at the time the cause of action arose. However, this kind of venue statute was declared unconstitutional by the Arkansas Supreme Court in the case of Philco-Ford Corp. v. Holland, 261 Ark. 404, 548 S.W.2d 828 (1977). The respondent has tried to equate a similar Arkansas statutory provision, ACA §16-60-114, as giving venue to the Circuit Court of Sebastian County.

"ACA §16-60-114.
a. Contract actions by resident subcontractor, supplier, or materialman against a prime contractor or subcontractor who is a nonresident of this state or who is a foreign corporation may be brought in the county in which plaintiff resided at the time the cause of action arose."

Because this statute also treats foreign and domestic corporations, and foreign and domestic individuals, differently, such would also be unconstitutional in the holding of Philco-Ford Corp. v. Holland, supra.

The Arkansas Supreme Court however did not feel from the record before it that the petitioner herein had proved that the action was one on open account. The Arkansas court refused to consider petitioner's argument that the complaint filed by the respondent was evidence of that fact. The court therefore would not consider the unconsitutional argument because nothing was shown that the

argument was previously raised in the trial court. The record, however, evidences that those matters were raised in the trial court as fully as could be at the time under the stance of the pleading at any such particular time before the court. The petitioner had at all time maintained that the residence of the respondent, Sebastian County, Arkansas, was an improper venue, and the record shows his repeated objections.

2. THE RECORD OF THE TRIAL COURT WAS A SUFFICIENT RECORD FOR THE SUPREME COURT OF ARKANSAS TO CONSIDER THE RESPONDENT'S COMPLAINT TO BE ONE ON OPEN ACCOUNT AND TO CONSIDER THE PETITIONER'S CONSTITUTIONAL ARGUMENT REGARDING VENUE.

The Supreme Court of the State of Arkansas failed, refused, or neglected to consider the complaint as filed by the respondent in the Circuit Court of

Sebastian County, Arkansas, as any evidence of the kind of action brought by said respondent. It is clear from looking at said complaint that the action is brought on open account. This is directly contrary to the statement in the opinion of the Arkansas Supreme Court as follows:

> "He (Helm) has not shown that the action amounted to no more than one on an open account." Mid-America Industries, Inc. vs. Delbert Neil Helm, ___ S.W.2d ___ (See Appendix "A").

The Supreme Court of Arkansas further would not consider the unconstitutionality of the section upon which the respondent sought to base venue stating as follows:

> "Helm has also made an argument that §16-60-109(a) is unconstitutional. We do not reach the issue because there is nothing to show that the argument was raised in the trial court. Wilson v. Wilson, 270 Ark. 485, 606 S.W.2d 56 (1980)." Mid-America Industries, Inc. vs. Delbert Neil Helm, ___ S.W.2d ___ (See Appendix "A").

Fairness, justice, and the rights of individuals guaranteed under the Constitution should have been sufficient for the Arkansas Supreme Court to consider the constitutional question. Whether or not it was presented fully, completely, and in a manner that the Arkansas Supreme Court thought it should have, was a matter of interpretation. The record shows that the issue of venue was raised from the beginning of the case, that petitioner was a nonresident, and that the location of the suit on open account was brought at the residence of the respondent, contrary to Arkansas law, and that to allow the same means that petitioner is treated differently from a resident of Arkansas since the open account venue statute requires it to be brought where the debtor is a resident. The method and time of presentation was adequate because the

threshhold of presentation was put forth in the state court action. The background of the facts of the case and the law of the State of Arkansas regarding the issue of the constitutionality of their venue statute herein questioned is sufficiently present in the record to have allowed the Supreme Court of the State of Arkansas and this court to decide such constitutional question. The property interest protected by due process require a constitutional review of the Arkansas venue statutes. The petitioner has from inception of respondent's action claimed that his federal constitutional rights of due process and equal protection of the laws is being violated by the Arkansas Courts affirming the respondent's choice of venue. These rights as being guaranteed under the federal constitution are therefore sufficiently presentable on

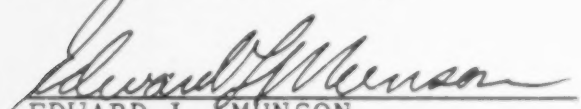
appeal since they were presented in the lower courts.

CONCLUSION

For the reasons hereinabove cited, particularly that that courts of the State of Arkansas have refused to recognize the form of action brought by the respondent as being one on open account and to apply the venue statutes of the state in accordance with such form of action, and particularly because the courts of Arkansas have refused to give consideration to the constitutional rights of petitioner to due process and equal protection of the laws by directly denying or refusing to consider his position on such matters, this Court should grant petitioner's Writ of Certiorari and thereby review such matters.

Respectfully submitted,

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO
PARTS, Petitioner,

BY: 

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Tahlequah, Oklahoma 74465
(918)456-8781

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. 89-226

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO PARTS,
Appellant,
v.
MID-AMERICA INDUSTRIES, INC.,
Appellee.

Opinion delivered March 12, 1990
Appeal from Sebastian County Circuit Court (CIV 89-925)
Honorable Don Langston, Circuit Judge
Affirmed

DAVID NEWBERN, Associate Justice

Delbert Neil Helm appeals from a judgment against him for $1,059,927.15 in favor of the appellee, Mid-America Industries, Inc. The judgment, which was based on a jury verdict, resulted from business dealings between the parties. Helm contends the Sebastian County Circuit Court lacked jurisdiction of him and was not the proper venue for the action. He also argues the court erred in proceeding with the action against him because it was already pending in a federal court in

Oklahoma. Finally, he contends it was error to deny his motion for a continuance which he sought on the basis of illness of his counsel. Helm's abstract is flagrantly deficient with respect to most of these points, but Mid-America has filed a supplementary abstract which will allow us to decide them, and we find they contain no merit. We, therefore, affirm the judgment.

Mid-America, a Delaware corporation, is a "Green Light" automobile parts wholesaler which has its principal place of business in Ft. Smith, Sebastian County, Arkansas. Helm is a resident of Oklahoma who operated parts stores in Oklahoma and Arkansas. Ed York, a Mid-America officer, testified about the circumstances which led to the business relationship between the corporation and Helm. Helm came to Ft. Smith and the

Mid-America office in February, 1986, and announced to a Mid-America employee who received him there his intention to become a Green Light parts dealer. York was unavailable to speak to Helm just then, but he called Helm, and a week later, Helm returned to Ft. Smith with his brother and another person who was his comptroller. They were given a presentation by Mid-America on the Green Light store process. Several weeks later, Mid-America officials toured several of Helm's stores in Oklahoma and Arkansas.

York testified that Helm's stock consisted of "distressed" merchandise defined as merchandise sold at a loss, as in a fire sale. York told Helm he would expect Helm to dispose of the distressed type merchandise and not purchase any more of it for sale if he became a Green Light dealer. Helm said he would comply with

that request. The alleged breach of this promise is a major element of the dispute which arose. Mid-America and Helm entered written agreements with respect to Helm's stores at Tahlequah and Bartlesville, Oklahoma, and Siloam Springs, Arkansas.

From a document entitled "Third Agreed Pre-Trial Order" which was submitted to the United States District Court for the Eastern District of Oklahoma, and which Helm has given us as an appendix to his abstract, we learn additional facts. Helm filed the federal court action for breach of contract and commercial defamation, and Mid-America counterclaimed for money owed to it by Helm. The summaries of the pleadings in that action reveal that the relationship had grown to other stores. Helm experienced a cash flow problem and was unable to pay his account with Mid-America, and he contended that

Mid-America had not properly credited him for merchandise it had agreed he could return and which it failed to pick up. Mid-America's counter-claim was for the balanced owed on Helm's account.

The action in Sebastian County Circuit Court was filed by Mid-America subsequent to the initiation of the federal action by Helm. The federal court declined to enjoin the state proceeding, and the circuit court denied Helm's motion to dismiss in favor of the federal action as well as his motion to dismiss for lack of personal jurisdiction and improper venue.

1. Jurisdiction in personam

Although it is argued that all of Helm's Arkansas automobile parts stores were closed at the time this action commenced, and Mid-America's argument mentions the fact on another point, there is nothing abstracted to demonstrate it. Nor do we

have any information as to the place where Helm was served in process, although Helm states in argument that he was served in Oklahoma. As far as we know, from the abstract of the record, Helm was still doing business with Mid-America in Arkansas when the action was filed. Even if that were not the case, however, we would have no trouble affirming the trial court's determination that Helm was subject to its jurisdiction.

Arkansas Code Ann. §16-4-101(c)(1)(a) (1987) provides that an Arkansas court may exercise jurisdiction of a person "who acts directly or by an agent" as to a claim "arising from the persons ... [t]ransacting any busines in this state." The evidence surrounding Helm's initiation of his relationship with Mid-America is probably sufficient to satisfy the requirement of the statute. If not,

however, the fact that Helm operated a store at Siloam Springs, at least from 1986 to 1988, which was responsible for some of the debt for which he was sued clearly satisfied it.

In Wisconsin Brick and Block Corp. v. Cole, 274 Ark. 121, 622 S.W.2d 192 (1981), we denied a writ of prohibition which had been sought to prevent an Arkansas court from assuming jurisdiction of a Wisconsin company. We held that the question of whether the company was "transacting business" in Arkansas was one of fact, and if the trial court erred in deciding the question we could correct it on appeal but not in response to a writ of prohibition. In the course of deciding that case, we noted that our long-arm statute, cited above, was meant to "permit courts to exercise the maximum personal jurisdiction allowable by due process, and the statute

should be liberally construed."

The only facts before us here show clearly that Mid-America's claim arose directly, at least in part, from business transacted by Helm in Arkansas. In addition, his contacts with this state surpassed the minimum required by the Supreme Court interpretation of the United States Constitution in International Shoe v. Washington, 326 U.S. 310 (1945), and Helm could have foreseen he could be haled into a court in this state to answer claims arising from his activies here. See World-Wide Volkswagon Corp. v. Woodsen, 444 U.S. 286 (1980).

The only case cited by Helm we need distinguish is Union National Bank v. Thornton, 293 Ark. 385, 738 S.W.2d 103 (1987), in which we held that the sending of monthly payments to an Arkansas bank was not a sufficient contact to satisfy

the requirements of Ark. Code Ann. §16-4-101 C. 1. (d) (1987) having to do with jurisdiction of nonresidents alleged to have committed torts in Arkansas. Obviously Helm's acts in Arkansas were considerably in excess of sending his monthly payments to Mid-Amercia.

2. Venue

Helm contends that Mid-America's action was one on a open account and thus the governing provision is Ark. Code Ann. §16-60-111(a) (1987) which requires that it be brought in the county of the defendant's residence at the time the claim arose. Mid-America contends it was an action on a contract and thus is properly brought against a nonresident in the county of the plaintiffs residence, Ark. Code Ann. §16-60-109(a) (1987); Farmers Bank v. Fuqua Homes, Inc., 259 Ark. 38, 531 S.W.2d 23 (1975), which was

Sebastian County.

While neither party has given us an abstract of the complaint in such a way as to show the nature of the action brought, Mid-America has abstracted its motion to amend the pleadings to conform to the proof along with the court's order granting the motion. The proof abstracted which could be said to relate to this point consists of testimony showing that the dispute, at least in part, had to do with written and oral agreements between the parties with respect to at least three of Helm's stores. In its argument, Mid-America has supplied quotations of the instructions showing that the case was submitted to the jury as a contract action.

While we have had some doubt about the matter, Helm, as the appellant objecting to venue, had the burden of

demonstrating that venue was improper. Mack Trucks of Ark., Inc. v Jet ASphalt and Rock Co., 246 Ark. 101, 437 S.W.2d 459 (1969). He has not shown that the action amounted to no more than one on an open account.

Helm has also made an argument that §16-60-109(a) is unconsitutional. We do not reach the issue because there is nothing to show that the argument was raised in the trial court. Wilson v. Wilson, 270 Ark. 485, 606 S.W.2d 56 (1980).

3. Prior pending action

Helm contends Mid-America claim should have been dismissed because of the prior pending action in federal court. There is no such requirement. Carter v. Owen-Illinois, Inc., 261 Ark. 728, 551 S.W.2d 209 (1977). Nor was there any requirement that the court exercise the

form non conveniens discretion given it by Ark. Code Ann. §16-4-101(E) (1987). See Country Pride Foods Ltd. v. Medina, 279 Ark. 75, 648 S.W.2d 485 (1983); Harvey v. Eastman Kodak Co., 271 Ark. 783, 610 S.W.2d 582 (1981); Grovey v. Washington, 196 Ark. 697, 119 S.W.2d 503 (1938). We find no error in the court's refusal to dismiss.

4. Illness of counsel

Helm moved for a continuance of the trial, attaching an affidavit from a physician stating that Helm's lead counsel was too ill to participate in a trial lasting more than one day. The motion was denied. Mid-America points out that the trial had been twice continued at the request of Helm.

In one of the cases cited by Helm at this point, we noted that whether to grant a continuance on the ground which was

asserted in this case is within the sound discretion of the trial court. Missouri & North Arkansas Ry. Co. v. Robinson, 188 Ark. 334, 65 S.W.2d 546 (1933). Also cited in Haislip v. Taylor, 209 Ark. 510, 190 S.W.2d 982 (1945), where we found an abuse of discretion where a party was made to go to trial only two days after a complaint was filed and given only three hours to search for witnesses. We cannot say Helm suffered any comparable hardship. While one of the two Oklahoma lawyers representing him in this case was suspended from practice and the other was ill, there has been no showing that the Arkansas attorney with whom they were associated could not have taken up the slack. We decline to hold the court abused its discretion.

Affirmed.

Price, J., not participating.

APPENDIX "B"

Office Of The Clerk
Supreme Court Of The State Of Arkansas
Arkansas Court Of Appeals
Justice Building, 625 Marshall Street
Little Rock, Arkansas 72201
April 15, 1990

Rex Earl Starr
Attorney at Law
P.O. Box 918
Stilwell, OK 74960

Robert L. Robinson, Jr.
Attorney at Law
400 West Capitol, Suite 2891
Little Rock, AR 72201

Re: 89-226 Delbert Neil Helm, d/b/a
Bills Green Light Auto Parts v.
Mid-America Industries, Inc.

Gentlemen:

The Supreme Court made the following order in the above styled case today:
"Petition for Rehearing denied."

Sincerely yours,

/s/ LESLIE W. STEEN,
Leslie W. Steen, Clerk

LWS:rh
cc: William P. Thomas
& James M. Llewellyn, Jr.
Peggy Watson
(#CIV88-925 (III))

APPENDIX "C"

IN THE CIRCUIT COURT OF SEBASTIAN
COUNTY, ARKANSAS
FORT SMITH DISTRICT

MID-AMERICA INDUSTRIES, INC.,
PLAINTIFF,

vs. NO. CIV-88-925 (III)

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO PARTS,
DEFENDANT.

JUDGMENT

On this 25th day of May, 1989, this cause came on to be heard, Plaintiff appearing in person and by their attorney, William P. Thompson, and the Defendant appearing in person and by their attorney, David Deatherage, and all parties being prepared for trial, a jury composed of twelve members of the regular panel of petit jurors of this court was selected, impaneled, and sworn according to law to try the issues of fact arising in this case. After hearing all of the evidence introduced, the instructions of the court and the arguments of counsel, the jury retired to consider its verdict, and after

deliberating thereon returned the following:

"We, the jury, find for the plaintiff and fix damages in the sum of $1,059,927.15."

Signed: Charles Duffield /s/
Foreman

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that Mid-America Industries, Inc., Plaintiff, have and recover of and from Delbert Neil Helm, d/b/a Bills Green Light Auto Parts, Defendant, the sum of $1,059,927.15, with interest thereon from the date of filing its Complaint until this date at the rate of 6% per annum, and from this date until paid at the rate of 10% per annum together with all their costs herein expended, for all of which execution may issue in accordance with law.

/s/ DON LANGSTON
CIRCUIT JUDGE

APPENDIX "D"

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

MID-AMERICA INDUSTRIES, INC.,
PLAINTIFF,

vs. NO. CIV-88-925 (III)

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO PARTS,
DEFENDANT.

COMPLAINT

MID-AMERICA INDUSTRIES, INC., for its complaint against DELBERT NEIL HELM, d/b/a BILLS GREEN LIGHT AUTO PARTS, states:

1. Plaintiff is a corporation duly organized and acting under the laws of Delaware with its principal place of business in Fort Smith, Sebastian County, Arkansas. Defendant is an individual citizen and resident of Tahlequah, Oklahoma, operating auto parts stores within Oklahoma and within Arkansas. Defendant owns property within Arkansas and has transacted business within Arkansas sufficient to afford this Court jurisdiction over his person under A.C.A.

§16-4-101.

1. Defendant owes Plaintiff $1,059,927.15 for goods purchased and delivered to his locations in Arkansas and Oklahoma as shown by the attached verified statement of account for which demand has been made and payment refused.

WHEREFORE, plaintiff prays for judgment against defendant for $,159,927.15, interest, cost, attorneys fees and all proper relief.

MID-AMERICA INDUSTRIES, INC.
Plaintiff,

BY: WILLIAM P. THOMPSON

William P. Thompson
James M. Llewellyn, Jr.
THOMPSON, PADDOCK & LLEWELLYN, P.A.
P.O. Box 818
Fort Smith, AR 72902
501/785-2867

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CAUSE NO. _____

DELBERT NEIL HELM, d/b/a
BILLS GREEN LIGHT AUTO PARTS,

PETITIONER,

V.

MID-AMERICA INDUSTRIES, INC.

RESPONDENT.

PROOF OF SERVICE

STATE OF OKLAHOMA)
) ss.
COUNTY OF CHEROKEE)

Edward L. Munson, after being duly sworn, disposes and says that pursuant to Rule 29.2 of this Court, he served the within Petition For Writ Of Certiorari To The Supreme Court of Arkansas counsels for Respondent by enclosing three (3) copies thereof in

envelopes, first class postage prepaid, addressed to:

William P. Thompson
James M. Llewellyn
Thompson and Llewellyn
P.O. Box 818
Fort Smith, Arkansas 72902
(501)785-2867
and
Mr. Leslie W. Steen, Court Clerk
Arkansas Supreme Court
625 Marshall Street
Little Rock, Arkansas 72201
(501)371-5245

and depositing the same in the United States mail at Tahlequah, Oklahoma on July 14, 1990.

Edward L. Munson
EDWARD L. MUNSON

Subscribed and sworn to before me this 13th day of July, 1990.

Mary Rose Cline
NOTARY PUBLIC

My Commission Expires:

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No. 90-116

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

DELBERT NEIL HELM, d/b/a
BILL'S GREEN LIGHT AUTO PARTS,

Petitioner,

v.

MID-AMERICA INDUSTRIES, INC.,

Respondent.

On The Petition For Writ of Certiorari
To The State Of Arkansas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

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DELBERT NEIL HELM, d/b/a
BILL'S GREEN LIGHT AUTO PARTS,

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v.

MID-AMERICA INDUSTRIES, INC.,

Respondent.

On The Petition For Writ of Certiorari To The State Of Arkansas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The constitutional validity of State Statutes was never drawn in question nor was a Federal question specifically set up or claimed in the Court of first instance, from all of which the Arkansas Supreme Court declined to rule on any such question for the first time on appeal, and by reason of which this Court should decline to entertain the Petition for Writ of Certiorari.

ARGUMENT

Contrary to what Petitioner would lead this Court to believe, he never, at any time, challenged the constitutionality of any statutes in the Court of first instance.

In his Motion to Dismiss, Petitioner stated:

> Comes now defendant and pursuant to Rule 12 of the Arkansas Rules of Civil Procedure moves the Court to dismiss this cause against him and as grounds would show to the Court that this Court lacks subject matter jurisdiction; this Court lacks jurisdiction over the person of defendant; venue herein is improper; service of process upon defendant is insufficient; and there is pending another action between the same parties arising out of the same transaction or occurrence.

Appendix "A" to Respondent's Brief in Opposition.

In its reply in opposition to the Motion to Dismiss, Respondent stated:

> Venue under the circumstances of the case at bar is governed by A.C.A. §16-60-109 which provides in pertinent part:
>
> > "Contract actions against a nonresident of this state or a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose."

Appendix "B" to Respondent's Brief in Opposition.

Petitioner was fully apprised at the outset of the specific venue statute on which Respondent relied. He was obligated to raise any Federal question at that time.

Thus, the Arkansas Supreme Court in declining to entertain any constitutional attack for the first time on appeal said:

> Helm has also made an argument that §16-60-109(a) is unconstitutional. We do not reach the issue because there is nothing to show that the argument was raised in the Trial Court. *Wilson v. Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980).

Helm v. Mid-America Indus., Inc., 301 Ark. at 525 (1990) found in Appendix "A" to the Petition for Writ of Certiorari.

The Petitioner must follow the state procedures in raising any Federal question. *In re Lamkin*, 355 U.S. 59 (1957), reh'g denied, 355 U.S. 908 (1957). Thus, when required by state practice, the Federal question must be raised before the Trial Court. It must be presented to the Trial Court at the point considered appropriate under state procedure. A state procedural rule which forbids the raising of Federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. *Williams v. Georgia*, 349 U.S. 375, 382-3 (1955). Thus, in *Beck v. Washington*, 369 U.S. 541, 550 (1962), the Court recognized the reasonableness of a State Supreme Court's refusal "to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute."

In *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897), this Court said:

> . . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

166 U.S. at 655. See also, *Webb v. Webb*, 451 U.S. 493, 496 (1981).

If the State Court does no more than discuss the interpretation of the State Statute, without considering such interpretation in light of a Federal question properly presented to it, the Supreme Court should not consider the Federal point. *Beck v. Washington*, 369 U.S. 541, 549-550 (1962).

The party invoking the Supreme Court's jurisdiction has the burden of showing that he properly raised the question, so that the State Court's failure to deal with it was not for want of proper presentation. *Webb v. Webb*, 451 U.S. 493, 495 (1981). As Rule 14(1)(h) of the Court states, a Petition seeking review of a State Court decision must "specify the stage in the proceedings, both in the Court of first instance and in the Appellate Courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

By not challenging the constitutionality of the State Statute in the Court of first instance, Petitioner has waived any Federal issue and there is no basis for the assertion of this Court's jurisdiction. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *C.I.O. v. McAdory*, 325 472, 477 (1945).

Where, as here, a Federal question is initially raised in an assignment of errors filed in the highest State Court, which refuses to consider any issue not presented to the Trial Court, the jurisdiction of the Supreme Court cannot attach. *Bailey v. Anderson*, 326 U.S. 203, 206-7 (1945); *Webb v. Webb*, 451 U.S. 493, 498-499 (1981).

Petitioner can point to no place in the record of the Court of first instance where he challenged the constitutionality of State Statutes or claimed that his Federal rights were being violated. This being so, it is difficult to understand how Petitioner could state, as he does, at page 18 of his Petition, that "The Petitioner has from [the] inception of Respondent's action claimed that his Federal constitutional rights of due process and equal protection of the laws is being violated by the Arkansas Courts. . . ."

With respect to the nature of this cause of action, the Arkansas Supreme Court held that it was the burden of Petitioner who was challenging venue to show the action amounted to no more than one on an open account and that he had failed to do that, pointing out that his abstract of the record was "flagrantly deficient." Rule 9 of the Arkansas Supreme Court requires the essential portions of the record to be abstracted by the Petitioner in such a way as to allow the Court to decide the issues being

raised. Appendix "C" to Respondent's Brief in Opposition. Thus, the Complaint set forth in Appendix "D" to the Petition for Certiorari was never properly presented to the Arkansas Supreme Court for its consideration as its opinion so reflects at 301 Ark. at 521 found in Appendix "A" to the Petition for Writ of Certiorari. Moreover, Respondent's Supplemental Abstract, as the Court observed, pointed to proof tending to show that the dispute, at least in part, had to do with written and oral agreements, and that Petitioner, who had the burden of demonstrating that venue was improper, had not shown that the action amounted to no more than one on an open account.

In *John v. Paullin*, 231 U.S. 583 (1913) the Court said:

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

231 U.S. at 585. See also *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190 (1925); *Chesapeake & Ohio R. Co. v. McDonald*, 214 U.S. 191 (1909).

CONCLUSION

It is clear from the opinion of the Arkansas Supreme Court and from the record in this case that Petitioner

never raised any Federal question in the Court of first instance. Moreover, Petitioner also failed to comply with the Arkansas Supreme Court's Rule 9 governing his obligation to adequately abstract the record on appeal for the proper presentation of issues to be decided by the Court. For these reasons, the Arkansas Supreme Court acted properly in refusing to entertain for the first time on appeal any challenge to the constitutionality of State Statutes and, for the same reasons, this Court should decline to entertain Petitioner's Writ of Certiorari.

Respectfully submitted,

MID-AMERICA INDUSTRIES, INC.,
Respondent,

BY: /s/ WILLIAM P. THOMPSON
WILLIAM P. THOMPSON
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P.O. Box 818
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APPENDIX "A"

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY,
ARKANSAS
FORT SMITH DISTRICT

MID-AMERICA INDUSTRIES, INC. PLAINTIFF

vs. No. CIV-88-925 (III)

DELBERT NEIL HELM d/b/a BILL'S GREEN LIGHT AUTO PARTS DEFENDANT

MOTION TO DISMISS

Comes now Defendant and pursuant to Rule 12 of the Arkansas Rules of Civil Procedure and moves the Court to dismiss this cause against him and as grounds would show to the Court that this Court lacks subject matter jurisdiction; this Court lacks jurisdiction over the person of Defendant; venue herein is improper; service of process upon Defendant is insufficient; and there is pending another action between the same parties arising out of the same transaction or occurrence.

Respectfully submitted,

BILL B. WIGGINS
Attorney at Law
P.O. Box 8065
Fort Smith, Arkansas 72902

/s/ Bill B. Wiggins
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that on this 15th day of November, 1988 I mailed a true and correct copy of the above and foregoing instrument to Mr. William P. Thompson, Attorney at Law, P.O. Box 818, Fort Smith, Arkansas 72902.

/s/ Bill B. Wiggins

APPENDIX "B"

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY,
ARKANSAS
FORT SMITH DISTRICT

MID-AMERICA INDUSTRIES, INC. PLAINTIFF

vs. No. CIV-88-925 (III)

DELBERT NEIL HELM d/b/a BILL'S GREEN LIGHT AUTO PARTS DEFENDANT

REPLY BRIEF IN OPPOSITION
TO MOTION TO DISMISS

Venue under the circumstances of the case at bar is governed by A.C.A. 16-60-109 which provides in pertinent part:

> "Contract actions against a non-resident of this state or a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose."

. . . .

Respectfully submitted,

MID-AMERICA INDUSTRIES, INC.
Plaintiff

/s/ William P. Thompson
William P. Thompson
James M. Llewellyn, Jr.
Thompson, Paddock & Llewellyn, P.A.
P.O. Box 818
Fort Smith, AR 72902
501/785-2867

CERTIFICATE OF SERVICE

I, William P. Thompson, have on this 28th day of November, 1988, caused a true and correct copy of the foregoing Reply Brief in Opposition To Motion To Dismiss to be mailed postage prepaid to the following: Bill B. Wiggins, Esq., P.O. Box 8065, Fort Smith, Arkansas 72902.

/s/ William P. Thompson

APPENDIX "C"

RULES OF THE ARKANSAS SUPREME COURT

Rule 9.

ABSTRACTS AND BRIEFS, CONTENTS

(d) Abstract. – The appellant's abstract or abridgment of the records should consist of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision. –